In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1156

ERROL F. NEUMAN and MICHAEL E. NEUMAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a trial by jury in the United States District Court for the District of Columbia, petitioners were convicted of transferring marihuana without a written order of the transferee, in violation of 26 U.S.C. 4742(a). Each was sentenced to imprisonment for a period of two to six years and a fine of $10,000. The court of appeals affirmed.

The evidence at the trial showed that an informant, Kenneth Galin, introduced two narcotics agents to

petitioner Errol Neuman, who said he wanted $8,000 for ten pounds of hashish. Errol also offered to deliver 100 kilograms of marihuana per week (Tr. 48-51.). When Michael Neuman arrived, Errol told him to "get the stuff." After Michael handed a duffel bag to one of the agents, both petitioners were arrested (Tr. 52-53, 115-116).

In his opening statement, defense counsel said that the whole truth was that petitioners were there because of Ken Galin, the informant (Tr. 37-38). When the court questioned the relevancy of questions asked in the cross-examination of a government agent regarding the circumstances leading to Galin's employment after his arrest for a narcotics offense, counsel replied, "This is going to be connected up, Your Honor, with evidence of entrapment on the part of (Galin) to obtain this sale by these defendants to those narcotic agents. * * * (T)hat he used efforts which I will argue, Your Honor, were per se entrapment, not even questions of fact, but per se entrapment in these discussions with these defendants" (Tr. 60-61).

The assistant United States attorney immediately gave notice that if the defense of entrapment was going to be raised, the government would offer evidence of petitioner's prior involvement in similar transactions to negative the inference that his unlawful conduct was so induced (Tr. 59). To determine the admissibility of further questioning along this line, the agent was interrogated out of the presence of the jury as to Galin's arrest and subsequent use as an informer (Tr. 59-66). When the court ex-

pressed doubt as to whether this evidence would sustain an inference of entrapment, counsel replied (Tr. 66):

> I can't establish that necessarily. I don't know, I can try to; but I don't think I can really hit it on the head. That will have to come whether I decide to put Ken Galin on the stand.

The court ruled out further interrogation of the witness along these lines at that time, but said he could later be recalled for further cross-examination (Tr. 66-67). The court made several further efforts to ascertain whether the defense of entrapment was going to be raised, even offering to let Galin be put on the stand for questioning out of the presence of the jury (Tr. 70-71, 73, 74). After the jury was recalled, counsel was permitted to cross-examine the agent as to the instructions he gave Galin (Tr. 75-79). The following exchange subsequently took place (Tr. 90-91):

> THE COURT: If you have witnesses who might show this agent planted the seed in the mind of these men here that they would not have committed this crime, if they committed the crime, had it not been for his scheming manner of inducing a couple of innocent boys to commit this crime. You don't have that picture yet.
>
> MR. POVICH: I am picking away at it.

Petitioner did not take the stand in his own defense, but was permitted to call Galin as an adverse witness and to cross-examine him (Tr. 197-199). Galin testified that he had been arrested on a narcotics charge, but was allowed to plead to a misdemeanor because of his assistance to the Bureau

of Narcotics and Dangerous Drugs (Tr. 200-203). He arranged the transfer of narcotics involved here and admitted that it was in his personal interest to do so (Tr. 203-205). He admitted that he had persuaded petitioner to attend the meeting that resulted in his arrest, but denied the use of threats against petitioner or his wife (Tr. 209-211). The court ruled that petitioner had raised the defense of entrapment and permitted the government to cross-examine Galin, over petitioner's objection, regarding purchases of marihuana which he had previously made from petitioner (Tr. 229-236). The court also gave approved instructions as to entrapment (Tr. 298-300).

In a brief *per curiam* opinion, the court of appeals ruled that the defense of entrapment should not be deemed raised by ambiguous actions of defense counsel but that, if counsel asked questions suggestive of entrapment, he should be instructed to plead the defense or abandon the line of questioning. However, finding the evidence here "ironclad", the court concluded that the error in admitting rebuttal evidence of predisposition was harmless.

Petitioner's argument that improper introduction of evidence of similar crimes can never be harmless error is without merit. The undisputed evidence in this case was that, in the course of bargaining, petitioner Errol Neuman offered to make substantial weekly deliveries of drugs to the agents. In that context, Galin's testimony that he had purchased marihuana on prior occasions, and had seen petitioners make other sales, was properly deemed harmless.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1971.

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